United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7215

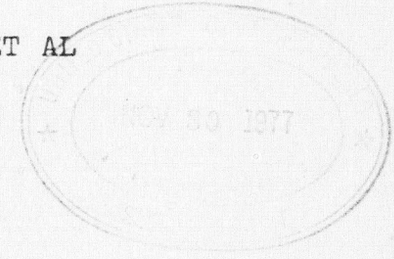
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

B

JAY BLUM,
Plaintiff-Appellant

v.

PROBATE COURT OF CHITTENDEN COUNTY, ET AL
Defendants-Appellees



Civil Appeal
Docket No. 77-7215

B R I E F O F D E F E N D A N T-A P P E L L E E

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TABLE OF CONTENTS

	PAGE
Table of Cases	i
Statement of Issues Presented for Review	ii
Statement of the Case	iii
Argument:	
Point I. THE DISTRICT COURT ACTED PROPERLY IN GRANTING THE MOTIONS TO DISMISS IN ITS ORDER AND OPINION OF FEBRUARY 22, 1977, AND GAVE PROPER CONSIDERATION TO PLAINTIFF'S AMENDED COMPLAINT DATED DECEMBER 21, 1976	1
Point II. THE COURTS ACTED PROPERLY IN DISMISSING AS TO DEFENDANTS CAIN AND THE PROBATE COURT OF CHITTENDEN COUNTY	5
Point III. THE VERMONT COURT WAS NOT REQUIRED TO LOOK BEYOND THE FOUR CORNERS OF THE MASSACHUSETTS DECREE FOR INFIRMITIES IN THE MASSACHUSETTS PROCEEDING.	8
Conclusion	10

TABLE OF CASES

CASE:	PAGE
Adam v. Saenger, 303 U.S. 59, 62	7, 9
Cook v. Cook, 342 U.S. 126, 96 L.Ed. 146, 72 S. Ct. 157 (1951)	9
Griffin v. Griffin, 327 U.S. 220, 234	8
Hampton v. McConnel, 3 Wheat 234	7
Hanley v. Donoghue, 116 U.S. 1	7
Milliken v. Meyer, 311 U.S. 457	8
Mills v. Durgee, 7 Cranch 481	7
Mullane v. Central Hanover Tire Co., 339 U.S. 306	8
New England Home for Little Wanderers, 328 N.E.2d 854 (1975)	3

STATUTES CITED:

42 U.S.C. 1983	6
15 V.S.A. 435(10)	6
15 V.S.A. 441	6
General Laws of Massachusetts, Chapter 210, §3	3, 5

UNITED STATES CONSTITUTION CITED:

Article 10, §1	7, 8

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ACTED PROPERLY IN GRANTING THE MOTIONS TO DISMISS IN ITS ORDER AND OPINION OF FEBRUARY 22, 1977, AND GAVE PROPER CONSIDERATION TO PLAINTIFF'S AMENDED COMPLAINT DATED DECEMBER 21, 1976.

II. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS DEFENDANT CAIN AND THE CHITTENDEN COUNTY PROBATE COURT ACTED PROPERLY PURSUANT TO STATE STATUTES AND THE FULL FAITH CREDIT CLAUSE OF ARTICLE IX, SECTION 1, OF THE UNITED STATES CONSTITUTION.

III. UNDER THE APPLICABLE STATE LAW, THE ACTIONS OF APPELLANT AND THE FACTS INCIDENT TO THE PETITION FOR TERMINATION OF APPELLANT'S PARENTAL RIGHTS DID NOT REQUIRE CONSENT BY APPELLANT TO THE PROCEEDINGS.

STATEMENT OF THE CASE

David Dan-Israel Blum was born on September 30, 1968. In October 1972, his mother took her own life, leaving Dan in the care of his naturally grief-stricken father. This loss, as well as a "hereditary sleep disorder" caused plaintiff to voluntarily admit himself to two mental health units in the Boston area during the period of December, 1972 through February, 1973. In March 1973, the Avon Home, a licensed child placement agency, was awarded custody of Dan Blum by the Probate Court of Middlesex County, Massachusetts. Six months later Cambridge (Mass.) Family and Child Services, successor to the Avon Home, petitioned the Court to place Dan Blum for adoption without the consent of his natural father. Jay Blum was notified of the upcoming hearing on that petition, and was represented by counsel, but did not appear at the hearing or in any way contest the petition. Apparently, advised by a physician that he would be unable to prevail at the hearing and that the only way he could be reunited with his son was by kidnapping the boy and absconding, plaintiff became "distraught" and, after unsuccessfully attempting to kidnap his son, immediately left the country for Israel. In his absence, the Middlesex Probate Court on August 29, 1974, ordered that the adoption could proceed without plaintiff's consent.

After returning to the United States, plaintiff petitioned the Massachusetts Supreme Judicial Court for

leave to file a late appeal, M.G.L.A., C. 215, & 15. The petition was denied without opinion on August 12, 1975. In the meantime, Dan Blum was transferred to the Vermont Department of Human Services, which consented to his adoption by the Goldhabers, who were and are Vermont residents. On May 5, 1975, with the consent of defendant Joseph Handy, Vermont Commissioner of Social and Rehabilitation Services, defendant Hon. L. John Cain, Judge of the Chittenden County Probate Court ordered that Dan Blum be adopted by defendants Dale and Jeanne Goldhaber.

Plaintiff's action was commenced in the United States District Court for the District of Vermont by Complaint dated June 4, 1976. The action sought relief under 42 U.S.C. §1983 and 28 U.S.C. §2241 and challenged the actions of the defendants in arranging and granting the adoption of Appellant's minor son, Dan Blum, by defendants Dale and Jean Goldhaber. The original Complaint was amended on June 22, 1976 to substitute Joseph Handy for Paul Philbrook as Vermont Commissioner of Social Welfare. Defendant Robert Polworth, Clerk of the Superior Court, was dismissed from the action on August 3, 1976. The remaining defendants (Goldhaber, Cain and Handy) filed motions to dismiss plaintiff's action under Rule 12(b)(6) F.R.C.P.

On December 21, 1976 a hearing was held on these Motions. Plaintiff filed a Motion to Amend his Complaint on December 21, 1976 to add, delete and substitute

certain allegations in the original Complaint. This Motion was granted by the Court (see Transcript of hearing, December 21, 1976, p. 12).

In an Opinion and Order dated February 22, 1977, the Court dismissed the action and plaintiff filed Notice of Appeal on March 21, 1977. Prior to that, on March 4, 1977, plaintiff filed a Motion to Amend the Findings and Judgment of the Court which was denied on April 21, 1977. Plaintiff filed a Notice of Appeal from that decision on April 15, 1977.

On June 20, 1977 Appellant filed a Motion to Consolidate the appeals, which the Court granted on July 7, 1977. In the June 20, 1977 Motion to Consolidate, Appellant, acting pro se, also requested the Court to dismiss all defendants except defendants Cain, Handy and Probate Court of Chittenden County.

ARGUMENT

POINT I. THE DISTRICT COURT ACTED PROPERLY IN GRANTING THE MOTIONS TO DISMISS IN ITS ORDER AND OPINION OF FEBRUARY 22, 1977, AND GAVE PROPER CONSIDERATION TO PLAINTIFF'S AMENDED COMPLAINT DATED DECEMBER 21, 1976.

Plaintiff suggests that the District Court negligently failed to give consideration to Plaintiff's Amended Complaint dated December 21, 1976, filed with and granted by the Court on the same date.

Plaintiff-Appellant asserts in Argument I that the Court acted upon an erroneous "set of facts" in granting the motions to dismiss in its February, 1977 order. Obviously, the Court, in granting or denying such motions, has before it only the properly pled allegations of the Complaint and any amendments thereto. If the facts pled are erroneous, insufficient or inconsistent, the Plaintiff is responsible and should be held to his choice of pleadings.

By Plaintiff's Amended Complaint, dated December 21, 1976, Plaintiff added three paragraphs and deleted paragraph 18 from Plaintiff's Amended Complaint dated June 22, 1976. Appellant argues that the District Court misapprehended the factual allegations concerning sufficiency of notice of hearing.

> The December 21 pleading stated in pertinent part that the Probate Court in Massachusetts granted the petition for termination of Plaintiff's parental rights without notice to Jay Blum and without holding an evidentiary hearing of any kind.
> Underlining added. (Appellant's Brief p. 5-6).

The State of Vermont would suggest that there is some confusion by Appellant as to the nature of the proceedings held in Massachusetts. It is clear, based on the pleadings and the applicable Massachusetts law, that there are two separate and distinct proceedings involved in Dan Blum's custody and adoption.

The first such proceeding was the petition for temporary guardianship brought by the Avon House and granted by the Middlesex County Probate Court about March of 1973. This is the proceeding referred to in Plaintiff's June Amended Complaint, paragraph 10, to which the December Amendment added:

> Said Probate Court granted the petition without notice to Jay Blum and without holding an evidentiary hearing of any kind.

It must be noted that this temporary guardianship procedure is not the same procedure which terminates parental rights as suggested by Appellant. The District Court took notice of such distinct proceedings in its February 22, 1977 Opinion Order at footnote 1.

The second stage of Dan Blum's Massachusetts custody proceedings was initiated by a petition brought by the Cambridge Family and Children's Service, successor to Avon House, on November 27, 1973, to obtain a decree establishing that the parental rights of the parents were terminated and custody given to the Agency.

Under the applicable law, termination of parental rights could be accomplished upon a determination that it

is in "the best interests of the child" by considering the "ability, capacity, fitness and readiness of the parent to assume parental responsibility." When there is such a determination of the "best interest of the child," the Court may dispense with the necessity of "consent" of a parent in the case of a petition of a licensed child care agency and proceed to allow termination of parental rights by order. (Massachusetts General Laws, Chapter 210, §2 and §3).

It has been recently held that Section 3 of Chapter 210 of the Massachusetts Domestic Relations Statute does not require a finding of unfitness of a parent, prior to disposing with the necessity for consent. New England Home for Little Wanderers, 328 N.E.2d 854 (1975). In the index to the notes construing Section 3 of Chapter 210 it appears:

> If parental opposition to custody of child by the state is by itself ever to constitute an effective bar to prosecution of action by state to dispense with necessity of parent's consent to adoption of child, such opposition must at least be consistently and vigorously pressed before the proceeding is brought. Note 2, Chapter 210, §3 of the Supplement. Emphasis added. Again citing New England Home for Little Wanderers.

In addition, Chapter 210 §3(c) creates a presumption that the "best interests of the child" would be served by dispensing with the need for parental consent when the child has been in the custody of an agency for more than one year. (The record indicates that at the time of the hearing on the petition to terminate parental rights Dan

Blum had been in the care of the Avon House or its successor for over a year. (February 22, 1977 Opinion Order footnote 1.) However, in paragraph 11 of the June Amended Complaint, which is unaffected by the December Amendment, it is stated that "Jay Blum was served with notice of said petition and was represented by counsel." In paragraph 14, also unaffected by the December Amendment, it is stated that, "[f]inal hearing on the petition was scheduled for April 4, 1974. Jay Blum did not appear at that hearing. Also in paragraph 15, it is stated that "Jay F. Theise, Esq. ... with permission of the Court, withdrew his appearance for Jay Blum citing Blum's failure to appear ... Taking these allegations together, the only reasonable inference to be drawn by the Court was that a hearing on the second petition was in fact held at the scheduled time, of which Appellant admits receiving notice, at which Mr. Theise, his attorney, did appear, but at which he, admittedly, did not appear.

Therefore, the District Court in weighing the allegations of the Complaint and its two Amendments must do so in the light which is consistent with the facts plead. As Appellant was represented at all times material hereto by qualified counsel in the filing of the Complaints, it is suggested that the fact of inconsistencies or contradictions in the pleadings should not be construed against the Defendants to find a claim for Plaintiff. Rather, it seems clear that Plaintiff had notice of a

hearing to terminate his parental rights and chose not to appear. This is not "consistent or vigourous opposition" which is required to establish a challenge to §3, Chapter 210 of the Massachusetts law.

Wherefore, the District Court acted properly in granting the Motions to Dismiss in its Order and Opinion of February 22, 1977.

POINT II. THE COURT ACTED PROPERLY IN DISMISSING AS TO DEFENDANTS CAIN AND THE PROBATE COURT OF CHITTENDEN COUNTY.

Plaintiff's Amended Complaint stated no claim against Defendant Cain upon which relief can be granted. Plaintiff's only allegations regarding Defendant Cain are found in paragraph 24, p. 6 and in paragraph 34, p. 7 of his Amended Complaint.

Paragraph 24 stated, "On May 5, 1975, Honorable L. John Cain, Judge of Chittenden Probate Court, without notice to Jay Blum or his attorney of record, Jay Theise, Esq., ordered that Dan Blum be adopted by Dale and Jeanne Goldhaber."

Paragraph 34 stated, "In ordering the adopting of Dan Blum by Dale and Jeanne Goldhaber while appeals were pending in Massachusetts, and without notice to Jay Blum pursuant to the unconstitutionally-obtained consent to the Vermont Department of Social Rehabilitative Services, Defendant Hon. L. John Cain violated the Fourteenth Amendment to the Constitution of the United States."

The statement contained in paragraph 24 is true. The allegations contained in paragraph 34 find no support in

applicable statutes or judicial decisions and therefore, fail to state any claim against Defendant Cain upon which relief can be granted. For Plaintiff to prevail in an action brought pursuant to 42 U.S.C. §1983, he must establish that he was denied his constitutional right to due process of law. In his Amended Complaint, Plaintiff asserts that Defendant Cain's failure to notify him of the proceedings in Chittenden Probate Court constituted such a denial. However, as Vermont statutory and decisional law make clear, Defendant's "failure" to give Plaintiff notice of these proceedings was proper and in no way constitutionally infirm.

That Defendant Cain acted properly and pursuant to the powers and authority of his office is amply borne out by 15 V.S.A. §§435(10) and 441, which provide in pertinent parts:

> §441. Notice of Hearing ... provided, however, that such notice shall not be given to the parent or parents when the minor has been committed to the care and custody of the department of social and rehabilitation services or a licensed child placing agency by a court of this state without limitation in respect to adoption, or has been relinquished to a licensed child placing agency in accordance with law. ...
>
> §435(10). Consent to adoption of minor. Except as hereinafter otherwise provided, if the person to be adopted is a minor, consent to the adoption shall be given, and the final adoption decree executed on the part of the minor, by both of his parents or by the surviving or sole parent. Such consent and decree shall be sufficient when given and executed:
>
> (10) By the department of social and rehabilitative services when so authorized by a public agency or licensed child placing agency of another state

having jurisdiction of a child whose adoptive parents are residing in Vermont.

Thus, Vermont law explicitly authorized the actions of Defendant Cain. He was under no statutory duty to afford Plaintiff any notice whatsoever of the proceedings in Chittenden Probate Court and in fact, was specifically precluded from so doing by the express terms of the aforementioned statutes.

Furthermore, Defendant Cain's acts find strong support in various judicial decisions which effectively rebut Plaintiff's assertions of alleged constitutional impropriety. Under the full faith and credit clause of the Constitution of the United States, Art. IV, §1, Defendant Cain was compelled to honor the Massachusetts judgment upon which the adoption proceedings were based.

> ... [T]he duty attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it is by law or usage in the state from which it is taken. Adam v. Saenger, 303 U.S. 59, 62. See also Hanley v. Donoghue, 116 U.S. 1; Hampton v. McConnel, 3 Wheat 234; Mills v. Durgee, 7 Cranch 481.

Clearly, Defendant Cain acted properly and constitutionally in honoring the Massachusetts judgment, Plaintiff's assertions to the contrary notwithstanding. Such assertions when examined in light of the full faith and credit clause are clearly without merit, and hence must be seen as asserting no valid claim against Defendant Cain.

Nor was Defendant Cain remiss in not giving Plaintiff notice of the proceedings in Chittenden County Probate Court. Plaintiff, as he admits in his Amended Complaint,

has been given notice of and the opportunity to appear and be heard at the proceedings in Middlesex Probate Court; that he chose not to appear at those proceedings can in no way impose upon Defendant Cain the duty of notifying Plaintiff of the commencement of any subsequent proceedings. As Chief Justice Stone declared in Griffin v. Griffin, 327 U.S. 220, 234, "Due process does not require that notice be given before confirmation of rights theretofore established in a proceeding of which adequate notice was given."

The constitutional requirement of notice sufficient to afford Plaintiff due process of law was satisfied when Plaintiff and his attorney received notice of the commencement of the Massachusetts Probate Court proceedings. Mullane v. Central Hanover Tire Co., 339 U.S. 306; Milliken v. Meyer, 311 U.S. 457.

Defendant Cain was therefore under no obligation, constitutional or otherwise, to afford Plaintiff any additional notice. Plaintiff's assertions must be adjudged as insufficient to establish a claim against Defendant Cain upon which relief may be granted and the Complaint against him should be dismissed.

POINT III. THE VERMONT COURT WAS NOT REQUIRED TO LOOK BEYOND THE FOUR CORNERS OF THE MASSACHUSETTS DECREE FOR INFIRMITIES IN THE MASSACHUSETTS PROCEEDING.

The full faith and credit clause of the United States Constitution, Article IV §1 precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal

principles on which the judgment is based. Milliken v. Meyer, 311 U.S. 457, 462, 85 L.Ed. 283, _____ S. Ct. _____(1940). In Milliken, supra, it was recognized that want of jurisdiction over either the subject matter or the person is open to inquiry in the challenge of a foreign judgment. However, the court went on to say:

> But if the judgment on its fact appears to be a "record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence or by the record itself.
> Adam v. Saenger, supra, 303 U.S. at p. 62 ... (emphasis added) Id. 311 U.S. at 462.

It is submitted that in the instant case, the Massachusetts decree dispensing with consent, which was before the Chittenden County Probate Court at the time of Dan Blum's adoption did indeed on its face appear to be a "record of a court of general jurisdiction" and, in the absence of a challenge on the basis of jurisdiction at the time, was properly considered by Judge Cain. He was under no constitutional duty to conduct on his own motion an inquiry into the jurisdictional basis of the Massachusetts proceedings if no defect appeared on the record and if no extrinsic evidence was presented. A judgment presumes jurisdiction over the subject matter and over the parties. Cook v. Cook, 342 U.S. 126, 96 L.Ed. 146, 72 S. Ct. 157 (1951). There is nothing in Appellant's Complaint which alleges that the Chittenden Probate Court had before it either evidence or a record disclosing jurisdictional infirmity.

CONCLUSION

The action taken by the District Court in its February 22, 1977 Order was based upon a correct apprehension of the law and specifically, the applicable constitutional directive to State judicial officers to give full faith and credit to the court order of a sister state. The facts plead by the Appellant indicate that there is no substantive disagreement that he did receive notice of a hearing at which is parental rights relative to his son might be terminated, and which he did not attend because of understandable emotional disorders and strain. Although the fact of notice is not in contention, the issue of consent to the probate court proceeding apparently is of issue. However, upon the very provision by which the parental rights were terminated, no such consent was actually required.

Such contentions of Appellant do not state a cause of action against the Defendant Probate Court or its Probate Judge by which relief can be granted.

Dated at Montpelier, Vermont, this 21st day of November, 1977.

Michael R. Gadue

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